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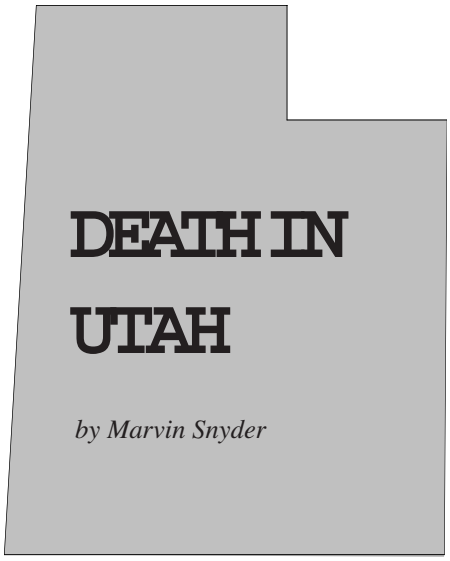

DEATH IN UTAH

by Marvin Snyder

Including survivor benefits in a qualified domestic relations order (QDRO) has become a routine practice as part of awarding pension benefits in marital dissolution. In name, a QDRO as a creature of federal law applies only to pension plans covered by the federal law on pensions, the Employee Retirement Income Security Act of 1974 (ERISA).

Many plans not covered by ERISA will, nevertheless, accept a QDRO or similar court order dividing a pension in divorce. The State Retirement Board of Utah has statutory authority to accept QDROs under Utah Code Ann. # 49-5-704 (Supp.1996), "UCA".

The Utah State Retirement Board administers the State pension program, including responding to QDROs which are submitted in divorce actions. Among its duties, the Board interprets UCA as it applies to QDROs. Spousal survivor benefits, for example, are available to be awarded in a QDRO in Utah, divided between a current and a former spouse when the State employee dies. As is the case in the law in most jurisdictions, in Utah a death benefit is a valuable component of a pension, which is considered property that accrued, partially or fully, during the marriage and thus as community property is subject to equitable distribution by a divorce court. Death benefits, or survivor benefits as they are also known, are subsumed in the pension or retirement benefits which are a form of deferred compensation provided for the employee by the employer. As such, death benefits must be considered by the court in fashioning an equitable distribution of community property or marital assets.

A recent case in the State of Utah involved the potential death benefits of a retired State employee. A QDROwas issued in the divorce action of a retiree from the FireDepartment covered by the Utah State Retirement Board. In addition to a portion of his pension awarded to his former wife, the QDRO also awarded a portion of his death benefits to her, payable if he should predecease her. The divorce occurred, he retired, and he did not remarry. The Board found that since he had no current spouse there was no spousal survivor benefit to be divided, and consequently it denied approval to the death benefits portion of the QDRO.

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IN THIS ISSUE

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FROM THE CHAIR

by Shawn Meadow, Chair

A STRANGE AND WONDERFUL ROAD TRIP TO TONOPAH

Where else but Nevada would one be able (or want) to make a road trip to Tonopah? (That statement reflects a firm grip on the obvious). Heading out of Reno, one passes through Fallon and by the Fallon Naval Air Base, a confusing anomaly in the middle of the desert. Join the Navy and see the World - of Fallon alfalfa fields. Even more confusingly, at Hawthorne, which must be over 300 miles from the nearest sea, one can visit the Naval Undersea Warfare Center. The place is a little scary and surreal anyway with hundreds if not thousands of ammo bunkers lined up in neat parallel rows from the highway to the distant mountains. Perhaps this is where Saddam is hiding the anthrax.

At Hawthorne one also has the intriguing choice of taking the "Hazardous Wastes" route, or the alternative, "Non-Hazardous Wastes" route. The former is known as "Freedom Road" apparently recognizing all Nevadans' right to run around with hazardous wastes in the back of our pick-ups.

At Mina, which doesn't even have 10 houses, there are at least 10 large green trash dumpsters with huge white lettering declaring "City of Fallon Refuse." Are the good folks of Fallon driving all the way to Mina to dump their trash? Are they taking the Hazardous Wastes route?

At Billie's truckers can get free coffee and showers. Does this really work? Are these truckers really stopping in for a chat with the girls over coffee?

Driving into Tonopah, the neon's out so the grand old hotel is now the IZPAH. The bustling shopping center is known as the Sandgrass Plaza. I saw the sand but missed the grass. Where else but Nevada would the Gospel of Hope Chapel be in a banquet room attached to a casino? The lyrics on the Matchbox 20 CD cry out: "I wish the real world would stop hassling me" and "I'm the same old trailer trash in a new suit;" hitting just way too close to home.

Tonopah. There's no stop light, no car wash, no movie theater and more divorce lawyers than there are married couples. And yet, although their town is swimming with sharks, the locals welcome us with open arms and gracious hospitality - and a minimum of bad lawyer jokes! Of course, they didn't actually see Todd in that dress or the boys in their Monty. However, many of them did catch Tom's act at the Station House Lounge.

When Chris came out from Ohio to take over CLE for the State Bar I'm sure he had never even heard of Tonopah, other than perhaps in the Little Feet song "From Tucson to Tucumcari from Tehachapi to Tonopah." We promise not to move the Spring Fling to Tehachapi or

Tucumcari. Kathryn lined up an excellent group of speakers who were both informative and entertaining. Ann, who had to put up with everything going wrong that could go wrong, handled the entertainment duties with grace, charm and humor. They both deserve a lot of credit for their hard work and dedication. As a reward, we've agreed to let them do it again next year. Reward?

A special thanks to all the members of the judiciary who attended and allowed us to take pot shots at their decisions. Where else but Nevada would two sitting Supreme Court Justices show up and let some punk slam his fist into the podium declaring that some of their decisions were "absolutely wrong." Thanks to all of those who made Tonopah a success, especially all of you who came and participated in the 1998 Family Law Spring Fling. Please plan on attending next year. The dates will be announced soon. We are always looking for speakers and for people to conduct the break-out round tables. If you have any interest in doing so, please call Kathryn or me. We love to have fresh new perspectives on the issues. Thanks again and we'll see you in 1999!

Utah con't

The Board interpreted UCA that there is only a spousal benefit available when there is a current living spouse [emphasis added].

The Board's reasoning was that the death benefit is payable under the retirement system to a spouse, and that it may be divided by QDRO between a former spouse and a current spouse, but first there has to be an existing current spouse or there is no benefit available to be divided. Without regard to the potential mootness of the issue, the retired employee, still living, with a living former spouse, requested a review of the Board's decision. Both the retiree and his former spouse desired the QDRO to be accepted with the death benefits included. The Board denied a review, Lamont Epperson, Petitioner v. Utah State Retirement Board, Respondent, No. 970075-CA, December 4, 1997, 949 P.2d 779 (Utah App. 1997).

The "tag line" summary of the case is intriguing: The Court of Appeals held that former spouse of retired public employee could receive death benefits regardless of whether retiree was married at time of his or her death. Of course, the Court meant that there is allowed to be a death benefit in a QDRO for a former spouse without inquiring as to the current marital status of the State employee. The Court found the Board's decision would have an absurd or unreasonable result.

The petitioner argued that the Board made an erroneous ruling that his former spouse's entitlement to a death benefit depended on whether he, himself, was married at the time of his death. The Court agreed that the plain language, as well as any reasonable interpretation, of the applicable section of UCA allows a former spouse to receive death benefits provided for in a QDRO regardless of whether the deceased retiree is remarried at the time of his death.

An irrational outcome has thus been avoided.

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ARTICLES, CASE SUMMARIES WANTED FOR NFLR

The Nevada Family Law Report seeks to provide interesting and substantive family law material to educate both the bench and the bar. NFLR needs articles for upcoming issues. If you are interested in writing critiques of pertinent cases, reports/opinions of family law legislation or discussions of family law trends and issues, please request authors guidelines from Editor Mary Rose Zingale, 528 Commercial St., Elko, NV 89801.

Articles published in the NFLR are eligible for continuing legal education credits. Contact the MCLE Board, 329-4443, for applications.

The Section's publication needs your input and contributions. Please contact an editor to discuss any article topic, critique or book review.

AVOID AMBIGUITY IN AWARDING ANNUITY

by Marvin Snyder

In marital dissolution, a spouse's pension annuity is generally recognized as community property available for valuation and distribution. A current or prospective pension may also be considered for purposes of measuring the spouse's income for alimony, child support or other marital-related measures. In some situations, a pension may be counted twice - which is sometimes thought of as "double-dipping".That would be when a portion of the pension is awarded to the spouse in property settlement, and then the employee's pension is counted again for the alimony or support.

The employee would argue that since the pension has already been divided as community property it should be off the table when it comes time to work out support or alimony payments. This position argues that the pension would then be over-counted, as if the real estate value of the residence were awarded to one of the spouse's but still counted as an asset of the other spouse.

The contrary position is that a pension is a unique form of marital asset. It is available for valuation to be used as an immediate offset to other community property. And, as well is to be recognized as the retired employee's income when that is measured for the other purposes of support.

In most cases the utilization of the pension will be clearly distinguished between a property award and an item of income to avoid any duplication.

A case in Oregon, however, illustrates the problem when the pension is not clearly determined as to its community characterization as property or as income, or both. *In the Matter of the Marriage of Bonnie May Campbell*, Respondent and Roy Hayes Campbell, Appellant at 948 P.2d 765 (Or.App. 1997),the Court of Appeals of Oregon reversed the Circuit Court's granting of Wife's motion to amend the divorce decree with respect to Husband's military pension.

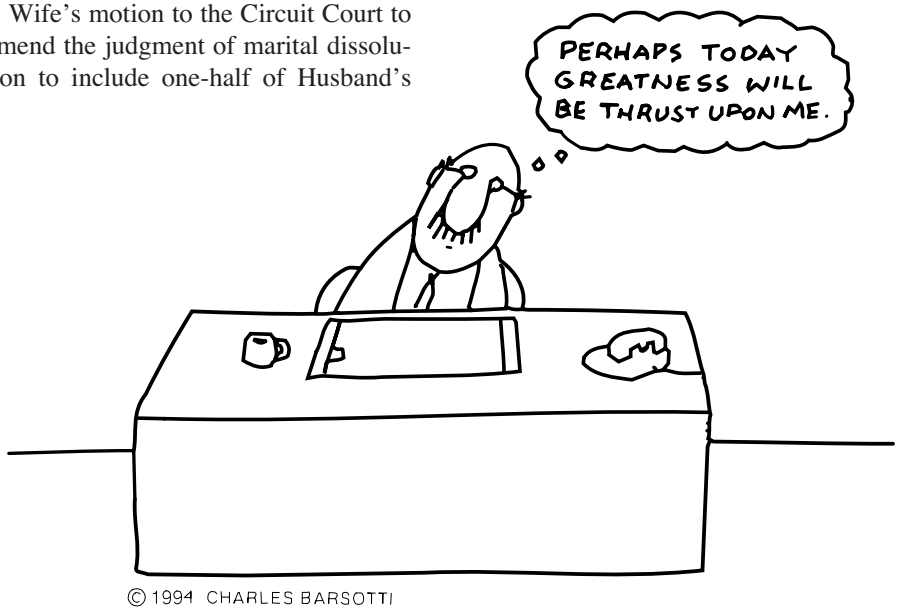
The trial court had considered the Husband's U.S. Navy pension in finding the amount of support he was to pay to Wife. In its opinion, the trial court mentioned that Wife is entitled to half of Husband's military pension, but the court made no specific provision to accomplish this. Nor was a domestic relations order or any other court order entered to obtain a portion of the pension for Wife.

When Husband fell behind in the support payments, and claimed insufficient income to meet the amounts due, Wife tried to collect directly from the U.S. Navy a one-half interest in her former husband's pension. The Navy declinedthe request because it was not in the proper form of court order. There was no court order at all concerning the military pension.

Wife's motion to the Circuit Court to amend the judgment of marital dissolution to include one-half of Husband's pension was accepted by that court. But, Husband's appeal to the Court of Appeals was successful that the original divorcecourt had considered his pension and disposed of it.

Whence, then, the ambiguity? A close reading of the original judgment of dissolution and the accompanying dicta leads to two contradictory results. Either the judge had counted the pension for support and saw no reason to award an actual portion of it to Wife, or the judge thought that somehow one-half of Husband's military pension would be given to Wife without any further action on the court's part.

The case cited did not discuss counsels' role in this confusion, but it certainly does illustrate that nothing should be assumed or taken for granted, and any possible ambiguity should be hunted down and eliminated before a case is finalized.



CASE SUMMARIES

Clause Terminating Alimony upon Cohabitation is NOT Against Public Policy and WILL be Enforced

Spector v. Spector, 112 Nev. 1395, 929 P.2d 964 (1996) Divorce decree entered in 1992 incorporated a child support and property settlement agreement, which called for permanent alimony "until [wife] cohabits with an adult male not a member of her family in a romantic relationship, dies or remarries." In 1995, husband moved to terminate alimony, based on his belief that the wife was cohabiting. The wife admitted to having sex with a male cohabitant, but denied that the relationship was "romantic." The district court (Stone) held the cohabitation clause void as against public policy and therefore void *ab initio*, and denied the motion.

On appeal, the Nevada Supreme Court noted that husband has cited cases from many jurisdictions permitting enforcement of voluntary agreements to end alimony upon the recipient's cohabitation, but that wife cited no case authority to the contrary. The Court held the cohabitation provision not void as against public policy, and remanded.

"Mutual Mistake" as to Value of Community Property Being Divided in Property Settlement Justifies Setting Aside Property Agreement — At Least When Six Million Dollars is at Stake

Gramanz v. Gramanz, 113 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 1, Jan. 3, 1997) Parties were married in 1975, and divorced in California in 1989. During marriage husband operated three retail shops on the strip next to the Desert Inn hotel, and had long-term commercial leases for the properties. In 1987, husband helped the owner avoid foreclosure, and in return got 25% ownership in the property, and extended the lease terms to 2007. The 25% interest was conveyed to husband and wife as joint tenants. The attorney who helped husband agreed orally that if the property ever sold at a profit, the attorney would get a bonus fee.

When the parties divorced, they reserved negotiations over property and custody issues. A year later, they stipulated in California that they were distributing "all property owned by the parties," and each warranted to the other that no additional property was owned, and that if any was discovered later, it would be equally divided.

They agreed that they could not agree to the value of the 25% ownership interest, so they put the property into a limited partnership, with the wife as the limited partner and the husband as the controlling partner. Wife transferred all her rights, interest, and shares in the family company, including "Anisac corporation" and the corporate assets, to husband as his sole and separate property, with the value of Anisac to be divided equally, in exchange for a hold harmless against any corporate liabilities.

The final valuation of Anisac was reserved "for future determination." To that end, the parties each hired CPAs, who attempted to agree on a value. In 1991, the parties filed a stipulation purporting to finally value and divide Anisac corporation. The stock was valued at $300,000.00. In total, wife received about 1.6 million dollars plus her 12.5% interest in the Strip property, later sold for $400,000.00.

In 1993, ITT-Sheraton wanted to buy the Strip property. Wife sent a letter of claim to husband, claiming an interest in the leases and a company not previously mentioned in the divorce documents (G&S). Husband filed a declaratory relief action in Nevada, and wife eventually stipulated that all legal questions be resolved in Nevada. Husband claimed that the wife's assignment to him of all right, title and interest in Anisac conveyed the leaseholds that it owned.

The Strip property was sold to ITT for 5.7 million dollars. The parties' joint 25% interest was sold for 1.5 million. After the mortgage was paid off, wife received $400,000.00 for her half of the 25% interest. Husband, however, also received some 6 million dollars for his Anisac stock, which conveyed the leases to ITT so they could be extinguished. The money was paid into court pending trial.

One of the accountants who had appraised Anisac testified that they used the "excess earnings method of valuing Anisac at $221,500, and had not looked at the leaseholds individually. The other CPA used a different valuation method, but also did not value it asset by asset. The lower court (Mosley) held that the wife had no right to the 6 million paid to the husband for the leases.

First the Supreme Court rejected the wife's jurisdictional attack, holding that the Nevada action was filed when there was nothing pending in California, and that the wife's stipulation was an agreement to defer everything to the Nevada court.

It is undisputed that the three leases were not considered individually. The husband's accountant testified that he was qualified to do business valuations, but was not a real estate appraiser. He did not recall ever seeing the leases themselves, and had looked at it essentially as a rental expense item when figuring the value of the going concern. Although the leases were mentioned in the divorce proceedings, the accountants they hired did not include the value of the leases except as part of the going business.

The Court held that the divorce stipulation was to divide assets equally, under the law of California, but the assets were not actually divided equally "because three long-term commercial leases of substantial value were omitted from the

valuation of the businesses." The Court found that both parties were "apparently unaware" of the value of the of the leases "separate and apart from the businesses." Husband had said he wanted them to run the businesses, and that until he negotiated with ITT he did not realize that the greatest value of the leases was a nuisance to ITT for which he could be paid for cancellation.

The Court found that "mutual mistake occurs when both parties, at the time of contracting, share a misconception about a vital fact upon which they based their bargain," citing General Motors v. Jackson, 111 Nev. 1026, 1032, 900 P.2d 345, 349 (1995), and reiterated that a "mutual mistake is a basis for an equitable rescission of a contract," citing Tarrant v. Monson, 96 Nev. 844, 845, 619 P.2d 1210, 1211 (1980). "Here, both parties apparently mistakenly believed that the leases had no independent value apart from their value as assets of an ongoing business, when in fact, the optimal value of the leases was as a nuisance for which ITT-Sheraton would be willing to pay $6,450,000. The stipulation as to the valuation of the Gramanz's businesses was entered into by the parties based upon a mutual mistake, and did not result in an equitable division of the community property." [EDITOR'S NOTE: What is most interesting here is the Court's non-reference to any of the mutual mistake or set-aside cases in recent years, from Benedetti, through Amie to Blanchard, Waldman, and Cook. This case also ignores the earlier line of cases regarding military retirement benefits, including Tomlinson and Taylor, in which they refused to set aside judgments when the parties were mistaken about the value of assets or the community property character of assets, focusing instead on whether the parties knew that assets not mentioned in the decree existed at all.]

The Court found that under California law, the parties remain tenants in common of property not awarded in a divorce, citing Henn v. Henn, 161 Cal. Rptr. 502 (Cal. 1980). Accordingly, they reversed and remanded for distribution to the wife of her share.

The court also found the wife liable for contribution to the bonus fee the husband had promised to the attorney who assisted in securing the interest. Husband testified that the wife knew of it, agreed to it, and was present when the agreement was made. The Court concluded that substantial evidence supported the lower court's finding that the wife had acquiesced in the oral bonus fee agreement, and had benefitted from it. The Court found that some of the wife's arguments, regarding violations of the Nevada Supreme Court Rules, might have had merit, but were not raised below and therefore were waived on appeal.

Husband's Various Financial Wrongs Justified Disproportionate Distribution of Community Property to Wife, but There are to be no "Retrospective Accountings" of Who Produced What

Putterman v. Putterman, 113 Nev. 606, 939 P.2d 1047 (1997) Follow up on *Lofgren v. Lofgren*, 112 Nev. 1282, 926 P.2d 296 (1996). Here, the wife received stock and a country club membership in addition to a half share in all other property. The Court reiterated that legislative change obliterated factors previously set out for equitable distribution, and failed to define "compelling reasons." In Lofgren, one such reason was financial misconduct of a husband who had wasted or secreted community assets.

Here, the lower court (Gaston) had noted reasoning going to "equity," "fairness," and that the wife was the principal acquirer of the community property while husband was "less of a contributing member to the community."

In passing the Court ruled that a statutory change enacted after the filing of the complaint but before judgment, did control the law applicable in this case.

The Supreme Court affirmed the trial court's distribution, finding that there are numerous possible "compelling reasons" for an unequal distribution of property, including "financial misconduct in the form of one party's wasting or secreting assets during the divorce . . . negligent loss or destruction of community property, unauthorized gifts of community property and even, possibly, compensation for losses occasioned by marriage and its breakup." The Court cited Moge v. Moge, 3 S.C.R. 813, 43 R.F.L. 3d 345 (Canada 1992); DeLa Rosa v. DeLa Rosa, 309 N.W.2d 755 (Minn. 1981) (compensation [not favorable property allocation] granted to wife as "reimbursement" for her support of husband while he obtained a medical degree).

Court makes a point of distinguishing hiding or secreting assets during divorce proceedings, on the one hand, from "undercontributing to or overconsuming of community assets during the marriage" on the other. "Obviously, when one party to a marriage contributes less to the community property than the other, this cannot, especially in an equal division state, entitle the other party to a retrospective accounting of expenditures made during the marriage or entitlement to more than an equal share of the community property. Almost all marriages involve some disproportion in contribution or consumption of community property. Such retrospective considerations are not and should not be relevant to community property allocation and do not present 'compelling reasons' for an unequal disposition; whereas, hiding or wasting of community assets or misappropriating community assets for personal gain may indeed provide competing reasons for unequal disposition of community property."

Here, the lower court had found that the husband refused to account for finances over which he had control, that he had charged several thousands of dollars in credit card debt after the separation, which the wife paid, and that the court believed that the husband was lying about having no income. The Supreme Court

found these grounds adequate "compelling reasons" for an unequal property distribution.

Even if Judge Does Not Remember Party, Prior Action in Same Case While an Attorney Merits Disqualification

Oren v. Oren, 113 Nev. 594, 939 P.2d 1039 (1997) Termination of parental rights reversed where judge in the termination case had been employed as a deputy district attorney and had given advice regarding crimes of which the parent had been charged when the children were first removed from his home, and had represented the state during a protective custody hearing.

Below, the judge hearing the disqualification motion (Gamble) found the disqualification motion untimely because the parent was in the best position to know that the judge had been a prosecutor in the earlier proceedings. Because Judge Gibbons claimed that he had no recollection of the case and harbored no bias, Judge Gamble denied the motion to disqualify.

The Supreme Court found the motion to disqualify timely under NRS 1.235. It was filed three months after trial began, and so not "within 20 days before the date set for trial or hearing." However, it was filed immediately after the parent's attorney received the information which proved that the judge had acted in some capacity in the earlier criminal proceedings. The Court agreed that the parent was in the best position to remember Judge Gibbons (rather than the reverse) but that since several attorneys had represented the state and the proceedings were three years earlier, "it is likely" that the parent "genuinely did not remember" the judge. The Court therefore held the 20-day-prior-to-trial requirement inequitable "when the disqualifying information was not available to [the parent's] counsel at that time. However, we caution that these are very unique circumstances and that litigants should make all efforts to file disqualification motions in compliance with NRS 1.235."

The Court noted that under NRS 1.230(2)(c), a judge "shall not act" because of implied bias "when he has been attorney or counsel for either of the parties in the particular action or proceeding before the court."

The Court bent over backwards to state that it found "no fault" in Judge Gibbon's failure to remember appearing, or in the failure of Judge Gamble to disqualify him; the Court would have agreed with those decisions "but for NRS 1.230(2) and our interpretation of it."

Family and General Divisions May Both Resolve Issues Outside their Jurisdiction when Necessary for Resolution of Claims over which Jurisdiction is Properly Exercised

Barelli v. Barelli, 113 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 96, Aug. 28, 1997) Parties divorced on September 23, 1988. Wife claimed that the parties entered into side agreement just prior to divorce whereby wife would continue working for husband in lieu of receiving alimony, paying $30,000.00 per year plus health benefits.

Husband's attorney drafted property settlement agreement providing that wife was and would continue to be self-supporting, and that no spousal support was warranted. It was silent as to any terms involving wife continuing to "work" for husband or getting insurance. Wife's attorney later claimed that he saw the agreement, objected strongly to the alimony waiver and (to his mind) too-small valuation of the community property, that it would not be modifiable because it did not merge in decree; wife signed over attorney's objections, and her attorney thought she was competent at the time of signing.

In 1992, wife filed suit in the civil/criminal division of district court, alleging fraudulent inducement to enter into the property settlement agreement based on the alleged oral side agreement. The Complaint requested reformation of the property settlement agreement to include alimony plus $250,000.00 extra in property settlement; in the alternative, she requested enforcement of the oral agreement.

The parties' testimony directly conflicted; the husband denied that any such agreement had ever been reached. The case was transferred to family court after its establishment, and despite a challenge to jurisdiction, the court (Fine) retained jurisdiction to hear the case. The judge found no contract existed, and denied reformation.

On appeal, turning first to subject matter jurisdiction, the Court reviewed Article 6, section 6(2)(b) of the Nevada Constitution. The Court recited the grant under NRS 3.223(1)(a) of "original, exclusive jurisdiction" to the family court over matters brought pursuant to chapters 62, 123, 125, 125A, 125B, 126, 127, 128, 129, 130, 159, 425 and 432B. The Court added, however, "[W]e do not believe that the legislature intended to prohibit the family court from adjudicating matters related to its jurisdictional authority." Specifically the Court ruled: "We hold that actions regarding the resolution of the marriage filed independent of the divorce proceeding to reform or rescind unmerged property settlements fall within the jurisdiction of the family court pursuant to article 6, section 6(2)(b) of the Nevada Constitution and NRS 3.223(1)(a)."

In explanation, the Court ruled that despite the contract claim, the question was really whether there was an oral agreement, on which depended the claim for reformation/rescission, which "had a potential for resurrecting claims for alimony and community property," so "the family court also had jurisdiction to adjudicate its existence."

For clarification, the Court noted that the civil/criminal court had jurisdiction

to resolve this case, holding that "both the family and the general divisions of the district court have the power to resolve issues that fall outside their jurisdiction when necessary for the resolution of those claims over which jurisdiction is properly exercised." As an "example," the Court stated that the family court had jurisdiction to reach a rescission or reformation claim "where family law issues are implicated," and likewise the general jurisdiction court could reach a family law "issue" where necessary to resolve a claim "that would ordinarily fall within its jurisdiction, such as reformation or rescission." The Court ruled that the wife was not entitled to a jury trial on the claim for contract damages, since the contract claim arose out of the marital relationship and is really "an action attempting to resolve the marriage," so that no jury entitlement existed under NRS 125.070.

[ED. NOTE: The rule stated appears to be that if resolution of the "ancillary matter" will of necessity affect a claim properly before the family court, the family court can hear the ancillary matter as well.]

Turning to the lower court's granting of the husband's NRCP 41(b) motion to dismiss the claim to reform the property settlement agreement, the Court noted that "technically," the ruling was improper because the issue of whether a contract existed involved the weighing of evidence. However, this was harmless error here and the rule about trial court discretionary rulings on conflicting evidence applies, because all evidence had been submitted when the ruling was made. While the lower court was required to consider all of the evidence presented by the non-moving party as true under NRCP 41(b), since the court found that there had been no oral agreement, "a finding of fraud was necessarily precluded," and the property settlement agreement could not have been rescinded on that basis. Since the Court found no agreement to exist, on conflicting evidence, there was no error in dismissal of the reformation/rescission claim, because without it there could be no claim for fraud.

By way of footnote, the Court reaffirmed that the purpose of reformation is "not to make a new agreement for the parties, but rather . . . to establish and perpetuate the actual agreement based upon the true intent of the parties. . . . Reformation will not lie to make a new contract for the parties [citations omitted]."

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